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United States
Circuit Court of Appeals
For the Ninth Circuit

THE WASHINGTON WATER POWER COMPANY, A CORPORATION,

APPELLANT,

V.

KOOTENAI COUNTY, A MUNICIPAL CORPORATION, AND FRED E. WONNACOTT, AS ASSESSOR AND EX-OFFICIO TAX COLLECTOR OF KOOTENAI COUNTY, IDAHO, AND HIS SUCCESSOR AND SUCCESSORS,

APPELLES,

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

JOHN P. GRAY,
COEUR D'ALENE, IDAHO.
F. T. POST,
SPOKANE, WASHINGTON,
ATTORNEYS FOR APPELLANT.

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APPELLANT,

v.

KOOTENAI COUNTY, A MUNICIPAL CORPORATION, AND FRED E. WONNACOTT, AS ASSESSOR AND EX-OFFICIO TAX COLLECTOR OF KOOTENAI COUNTY, IDAHO, AND HIS SUCCESSOR AND SUCCESSORS,

APPELLES,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

STATEMENT OF FACTS.

The Washington Water Power Company, a Washington corporation, is the owner of a hydro-electric power plant situated at Post Falls on the Spokane river in Kootenai County, Idaho. At Post Falls is a natural water fall, which has been improved. The Spokane river heads about nine miles above Post Falls, and is the outlet of Lake Coeur d'Alene. Flowing into Lake Coeur d'Alene are two large rivers and in the power development a considerable

amount of low land adjacent to the lake and to the two rivers flowing into the lake was overflowed and acquired by the company. This property is all situated in Kootenai County.

The distribution system of the company extends through the two counties of Kootenai and Shoshone and practically all of the power developed at the plant is disposed of in the Coeur d'Alene mining district in Shoshone County, Idaho, for mining purposes.

At the time the taxes complained of in the bill were levied, the property in each county was assessed by the local county assessors. The property under the system then in vogue was not assessed as a whole, but by separate items. Complaint was made by the bill of the valuation for assessment purposes placed by the assessor of Kootenai County upon the property of the appellant situated at Post Falls, taxes upon the other items of property, to-wit, the overflow lands, the distribution system and the property in Shoshone County having been paid. The property so covered by the bill is situated in several school districts and road districts; a portion of the taxes complained of went to each of the school districts, to the various road districts, a portion to the county and a portion to the State of Idaho, and for those reasons and for the purpose of preventing a multiplicity of suits as well as others which will be hereafter referred to, appellant brought itself within the jurisdiction of a Federal equity court.

The appellant complained of the assessment as both unequal and excessive; that not only was the assessment unjust and unequal in that the property of the appellant was assessed proportionately higher than other property, but the appellant also charged that its property, concerning which complaint was made, was assessed at a sum vastly in excess of its full cash value. The assessments established by the county officers complained of were as follows:

On page 11, Book 1 of Deeds, situate in Sec. 3 and 4, Twp. 50, Range 5, and on pages 412 and 413, Book "U" of Deeds, in Sec. 4, Twp. 50, R. 5	$1,080,000.00
On pages 460, 461, 462, 464 and 465, Book 9 of Deeds, in Sec. 3, Twp. 50, Range 5	75,000.00
On pages 97, Book 34 of Deeds, Grist Mill in Sec. 3, Twp. 50, Range 5	40,000.00
Bear Trap dam and small dam at Post Falls	562,500.00
Building and excavations, Sec. 4, Twp. 50, R. 5,	223,000.00
Machinery on Island No. 2, Sec. 4, Twp. 50, R. 5	350,000.00
Concrete foundation and dam, Sec. 4, Twp. 50, Range 5	150,000.00
Railway spur and bridge	48,750.00
	$2,529,250.00

The valuations upon the real estate were reduced 15 per cent by the State Board of Equalization, together with all other real estate in the County of Kootenai, the power of the State Board under the Idaho laws being to increase or diminish all property of a certain classification within a county solely for the purpose of equalizing between counties.

The appellant presented to the court evidence showing the value of the property, based upon three methods of arriving at that value. First, its actual cost, second, the cost of reproduction and third the value based upon its earnings.

(1) THE COST

The property, the value of which was complained of in this case, cost the appellant $1,068,773.01, and without the land, the dams, machinery and buildings cost $959,500.57. This cost was shown by the testimony of the witness Uhden, who had checked over the cost from the original records kept by him at the time of its construction. (Record, page 326-7). in the course of the testimony there was shown to be some slight additions thereafter. The testimony was not controverted, and the court below in its opinion recognized the force of the uncontradicted testimony upon that feature and in the opinion used the following language:

"It is sufficient to say that upon credible testimony it appears that the actual cost of the artificial plant, all of which has been constructed within the last six years, was between $900,000.00 and $1,000,000.00, and the cost of all the property embraced within the assessment under consideration, including site, water rights, and all other natural advantages, did not exceed $1,200,000, and was probably more nearly $1,100,000. It further satisfactorily appears that the artificial plant could be reproduced new for substantially what it cost." Record p. 627.

(2) THE COST OF REPRODUCTION

The testimony showed that the cost of reconstructing the plant exclusive of the site or water right of way would be $954,170.79. This estimate was fixed by Mr. A. J. Wiley, a construction engineer of great experience and represented his independent investigation (Record, pages 316-317). This testimony was not controverted, and the court below accepted that testimony as correct.

(3) THE VALUE BASED UPON THE EARNINGS OF THE PLANT

In this connection, it is but fair to state that the testimony showed that the power development of the appellant at Post Falls, and the dams there installed, not only tended to develop the natural water fall, but did increase to a considerable extent the usefulness of Lake Coeur d'Alene as a storage reservoir, and did conserve a quantity of water, concerning the exact amount of which there was a con-

flict in the testimony, for use in low water season.

It further appeared by the testimony that situated in the State of Washington the appellant owned other power plants upon the same river, some of which were to some degree benefitted by the increased flow of the Spokane river during the low water season resulting from the storage of water in Lake Coeur d'Alene.

With reference to the earnings of the plant and its value based thereon, there was little, if any, conflict, the controversy being entirely as to the deductions to be drawn from the facts which were not controverted. The plant at Post Falls is many miles nearer the mines in Shoshone county than any other plant of appellant. There is, however, an interlocking of the plants for the purpose of security of service and additional assurance of continuous service to all customers, both in Washington and Idaho. However, the energy distributed to the Coeur d'Alene mines is distributed from the Post Falls plant for economic reasons principally, it being nearer, and such surplus as is not used in Idaho was transmitted to the state of Washington and there distributed and sold in the city of Spokane by the appellant. The method of crediting to revenue the surplus of power so transmitted to Washington is hereafter referred to.

By reason of the factors referred to, the court below was of the view that there was apparently no

means by which the value of the site of the appellant could be intelligently estimated except by including it in the plant as a whole and capitalizing the value thereof. In arriving at the value of the property of the appellant based upon the capitalization of its net earnings, the testimony was not conflicting, and the court adopted in his opinion and for the purpose of reaching a conclusion, the calculations of Professor Corey, which were substantially the same as those of the witness Wiley, both called as experts on behalf of the appellant. The calculations of Mr. Wiley were contained in Exhibit 18, pages 217-225.

The value of the property, the assessment upon which is in controversy in this action, according to Professor Corey was $988,573.85 at the time the assessment complained of was levied. The calculations were based upon the gross revenues of the plant for the three years preceding averaged up, and upon the basis of permitting an earning of 10 per cent per annum, the appellant contending that because of the hazardous business in which it was engaged, namely, the dependence practically in whole upon mining for its revenue, that it was entitled to earn such a return. The court below allowed less for depreciation and maintenance than the witness Corey and the witness Wiley testified in their judgment was proper; allowed less for management, and capitalized the net earnings at the rate of 8 per cent.

There was then deducted by the court in the same manner as Professor Corey had made deductions, the depreciated value of the Shoshone County property, the overflow lands, the pole lines and substations at Cataldo upon which the taxes had been paid, leaving only then the hydro-electric plant and power site at Post Falls, and as found by the court, the value of the property covered by the assessment under consideration arrived at in that manner amounted to the sum of $1,718,636.37. (Opinion of the Court, pages 631-633). Except in one respect did the court disregard the figures shown in Exhibit 18, other than to change the amount which he believed proper for depreciation, maintenance, management, etc., and that was in connection with the making of additional credit to revenue on account of power delivered to two men by the name of Martin and Strathern, who for a part of the original power site instead of taking money received a grant from the appellant of a perpetual right to a certain quantity of power.

The assessed valuation placed by the assessor of the county upon all such property, amounted to the sum of $2,529,250, approximately $1,400,000 more than the original cost and exclusive of the right of way, approximately $1,500,000 more than the cost of reproduction, and a little over $810,000 more than the court found the value of the property to be based upon the capitalization of its earnings on the basis

of a return of 8 per cent, and with the small depreciation, maintenance and management charges allowed.

The court below upon the testimony and upon the findings which have been briefly above referred to, took the view which is succinctly stated in the opinion, Record pages 642 and 643, and which presents in large measure the questions in which we believe the court erred. We may be therefore permitted to quote from the opinion as follows:

"Keeping in view these conditions of the case, and bearing in mind that light decrease in an allowance for depreciation or maintenance or for some other account, and a small increment of gross revenue, would operate materially to increase the capitalized value, and further bearing in mind that the amount of power sold in 1910, greatly exceeds that sold in 1908 and that apparently the output in 1910 was below the full capacity of the plant, and that the revenue which may be derived from the sale of any additional power will be subject to comparatively small deductions on account of increased expense, it is apparent that upon the record before us reasonable men might reach different conclusions, and that a finding of a value two or three hundred thousand dollars more, or less, than it is herein found to be, could not be set aside for insufficiency of the evidence; and it must be remembered that the assessor and board of equalization were not possessed

of much of the information of which we have the benefit. It is therefore thought that if we had nothing but the total or aggregate valuation made by the assessor, it would not be a case in which a court could afford relief against an excessive assessment; of course, if the county officers had had the light which is now shed upon the subject by the evidence before us, a different view might be taken."

However, the court did reduce the valuation upon the Bear trap dam and small dam by the sum of $386,229, and upon the railroad spur and bridge $28, 954.61, a total reduction of $415,183.61, and with those reductions and one further reduction of 15 per cent upon the real estate allowed by the State Board of Equalization, judgment was entered against the appellant and directing that the taxes be paid upon that valuation, together with penalties thereon. From the judgment, this appeal has been perfected.

ASSIGNMENT OF ERRORS.

The appellant specifies the following particulars in which it believes and avers the court erred in rendering the decree herein:

I.

The court erred in holding that the proof of the complainant does not make out a case of clear and hostile discrimination against the complainant, against the collection of any portion of the taxes complained of.

II.

For the reason that the court found as a fact based upon the earnings of the plant as allowed by the court, upon the depreciation as allowed by the court and other items as found by the court, that the value of the plant did not exceed the sum of $1,718,-636.37, and that that sum represented the value of the property covered by the assessment under consideration, and then declined to give the complainant the benefit of such finding, but permitted the assessment complained of to stand as the value of the said property, and allowed no deductions from the assessment made by the said assessor, except a reduction from the assessed valuations on the dams of $386,229, and of $28,954.61 from the assessed valuation of a railroad spur and bridge.

III.

For the reason that even under the facts as found by the court, the valuation of the property under consideration could not and should not have been fixed or permitted to stand in any sum in excess of the sum of $1,718,636.37.

IV.

The court erred in permitting the valuation of $19,795.39, the original cost of a railroad spur and bridge, to remain as the assessed valuation, thereof, whereas, the testimony showed that the structure was simply put in for construction purposes and was not of a value in excess of $4,500.

V.

For the reason that the court erred in not reducing the valuation upon the railroad spur and bridge of the complainant from the sum of $48,750 to the sum of $4,500.

VI.

The court erred in refusing to enjoin and restrain the collection of taxes complained of upon the property of the complainant.

VII.

The court erred in including in its decree any penalties against complainant for failure to pay the taxes assessed against the property referred to in the bill.

VIII.

The court erred in taking into consideration the fact that the complainant owned other power sites in the State of Washington in arriving at the value of the real estate and power site of the complainant and in taking into consideration anything other than the value of the plant of the complainant, and in fixing its cash value at the amount which that plant would be taken at in payment of a just debt due from a solvent debtor.

IX.

The court erred in taking into consideration the possible benefit to certain property owned by the complainant in the State of Washington, arising from the ownership by complainant of the controll-

ing works at Post Falls, in fixing the valuation of the property of complainant.

ARGUMENT.

The court had jurisdiction in this case to grant the relief prayed for if the complainant was entitled to the same.

Section 2, Article VII of the Constitution of Idaho provides:

"The legislature shall provide such revenue as may be needful by levying a tax by valuation so that each person or corporation shall pay a tax in proportion to the value of his, her or its property, except as in this article herein otherwise provided.

Section 5 of Article VII provides as follows:

All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

The statutes in force at the time the tax complained of in this action provided, Section 1652, Revised Codes:

All taxable property must be assessed at its full cash value; lands and improvements thereon must be assessed separately.

Section 1646 of the Revised Codes defines the term "value" and "full cash value" as follows:

The term "value" and "full cash value" means the amount at which the property would be taken

in payment of a just debt due from a solvent debtor.

In this case the appellant alleges that its property has been assessed at more than twice its full cash value, and that no other property in the County of Kootenai was assessed in excess of its full cash value. The respondents claim that all property in the county is assessed at its full cash value, and that the assessment of the property of the appellant complained of represents only the full cash value of appellant's property. What the appellant is complaining of is that its property is assessed in excess of its full cash value, in violation of the constitutional provisions and the statutes of the state. Let it be borne in mind, that this is not simply the case of one taxpayer claiming that all property in the county is assessed at less than its full value and that his property is assessed at a percentage greater than that of the other property in the county.

JURISDICTION OF THE FEDERAL EQUITY COURT.

The requisite diversity of citizenship is shown. The court has jurisdiction over the cause because it is a suit between citizens of different states, and the only question is whether or not ground exists for invoking the action of a court of equity. It is, of course,, well settled that a suit to enjoin the collection of a tax will not be sustained in a court of equity, at least in the Federal equity courts, in which the sole ground set forth in the bill is that the tax is illegal or excessive. There must be some other cir-

cumstance or fact which will bring the case under some recognized head of equity jurisdiction.

The record in this case shows that a portion of the taxes are for state purposes, a portion for county taxes of Kootenai County, a portion go to various school districts, and a portion to various road districts. Nothing but a suit in equity could be of any avail to the appellant. No action can be maintained against the state, no recovery had against the state, and money once paid into the state treasury can only be taken out by an act of the legislature. It would require a multiplicity of suits to recover back the excessive sums required to be paid to the various school districts, road districts and the county. Upon that ground then, the equity court had jurisdiction.

It is further alleged and admitted that the excessive tax if not paid would be a cloud on the title of the appellant; that its property would be sold and certificates of sale issued, and would be a cloud upon the title. In other words, this is not an action in which the jurisdiction of the Federal equity court is asked solely and simply because of an excessive levy, but upon well established and well recognized rules of equity jurisdiction.

Atchinson T & S. F. R. Co. v. Sullivan, 173 Fed. 456-469.

Dows v. City of Chicago, 11 Wall. 108.

Taylor et al. v. Louisville & N. R. Co. 88 Fed. 350.

State Railroad Tax Cases, 92 U. S. 575.

In this case, under the evidence and the record, it must be evident that the assessor of Kootenai County in assessing the property of the applelant did not exercise intelligent discrimination or fair measure of honesty to the appellant and that the County Board of Equalization did no more. The officers of the county were guilty either of intentional wrong or of gross mistake. The evidence in the record as to the assessment of property is that no property was assessed at its full cash value other than the property of the appellant, which was assessed in excess thereof upon any basis of computation which might be adopted. Among other testimony introduced was appellant's Exhibits 15 and 16, pages 133 to 142 inclusive. Included therein are shown all conveyances of land in Kootenai County during the year 1911, where other than a nominal consideration was named in the conveyance and the valuation thereof for assessment purposes after equalization. In Appellant's Exhibit 16 are shown all mortgages placed of record during the year 1911, the consideration of the mortgage and the value placed upon the property for assessment purposes. These show more accurately than could any testimony of witnesses as to the particular piece, that there was a systematic undervaluation throughout that county, that other property was not assessed at its full value or anything like it, and scarcely a piece of land mortgaged during that time was valued for assessment purposes at the amount of the mort-

gage placed upon it and often times far below the mortgage.

Upon this appeal, however, the position of the appellant is that under the Constitution and laws of the State of Idaho, the assessment in this particular case constitutes such a fraud in law that the court had jurisdiction to grant relief and that it was its duty to investigate the value of the property, the valuation placed thereon by the assessor and to give to the appellant the benefit of the conclusions which the court reached as to the value of the property, and upon that ground this appeal is presented.

At the time the case was commenced and at the time of the trial there was in Idaho no Public Service Commission. Since that time, one has been created and the questions of the amount which should be allowed upon such property for depreciation, maintenance, operation and reasonable rate of return are all matters that will sooner or later be of necessity enquired into and settled, by that commission. Because of that fact, although the appellant believes the allowance for depreciation, maintenance and management allowed were too low and that they should have been fixed as testified to by Professor Corey and Mr. Wiley, the appellant does not ask this court to review the action of the court below upon those matters, but so far as this particular appeal is concerned is content to let them stand. What we do most earnestly urge is that the appellant was entitled to

the benefit of the findings of the court below upon the value of the appellant's property.

The court below, in arriving at the valuation of this property based on its earnings, allowed a minimum sum to be charged against the gross earnings for maintenance, for depreciation, for management, but even when capitalized upon an allowed earning of 8 per cent the property could be given a value no greater than $1,718.636.37, and yet that very property had been assessed by the assessor of Kootenai County and the assessment upheld by the Board of Equalization in the sum of $2,529,250. The assessor had made no honest attempt to investigate or cause to be investigated the books or property of the company. The Board of Equalization had been offered access thereto and had taken no advantage thereof, but simply upon the assessor's statement, without evidence or investigation on his part, sustained his assessment at a sum over $800,000 in excess of what the court found to be its highest value, based upon its earnings, and $1,400,000 in excess of what it cost.

Where the facts are such as these, it must be that a court of equity has the power and imposed upon it is the duty to grant relief to the property owner. The court below, notwithstanding the very great difference between what the property was shown to be worth, and its assessed value, was of the opinion that if it had been assessed as one item, the fact that it was assessed so beyond its actual

value, as shown by its cost or by its earning capacity, would not be a case in which the court could afford relief against an excessive assessment. In other words, the view of the court below is thus expressed:

"Keeping in view these conditions of the case, and bearing in mind that a slight decrease in an allowance for depreciation or maintenance or for some other account, and a small increment of gross revenue, would operate materially to increase the capitalized value, and further bearing in mind that the amount of power sold in 1910 greatly exceeds that sold in 1908, and that apparently the output in 1910 was below the full capacity of the plant, and that the revenue which may be derived from the sale of any additional power will be subject to comparatively small deductions on account of increased expense, it is apparent that upon the record before us reasonable men might reach different conclusions, and that a finding of a value two or three hundred thousand dollars more, or less, than it is herein found to be, could not be set aside for insufficiency of the evidence; and it must be remembered that the assessor and board of equalization were not possessed of much of the information of which we have the benefit. It is therefore thought that if we had nothing but the total or aggregate valuation made by the assessor, it would not be a case in which a court could afford relief against an excessive assessment; of course, if the county officers had had the light which is now shed upon the subject by the evidence

before us, a different view might be taken." P. 642-3.

The particular complaint which this appellant makes is that the court below in its view of the law erred and that if the court had the power at all to examine and investigate into the value of the property, it was its duty where there was shown to be so great a difference between the aggregate valuation made by the assessor and that shown by the testimony, to give relief. Otherwise the very provisions of the Constitution of Idaho and the provisions of its laws with reference to the just and fair and equal assessment of all property are without force. If, as a matter of law, a court of equity cannot interfere with the discretion of the taxing officer however it may be abused, upon that ground it might be that the appellant would be entitled to no relief, but if that power exists, where such a gross over valuation beyond the full value of the property is shown as was in this case, it then must certainly become the duty of the court to give the benefit of its findings to the tax payer.

The court below appreciated that the appellant had been over assessed. The opinion of the learned judge below so shows, and because of that view the court below did give to the appellant the benefit of a reduction of $386,000 upon the value placed upon the dams, and $29,000 upon a railway spur and bridge. If the court found those dams to be so excessively assessed, it was the same plain duty of the court below to give to the appellant the benefit of his

findings in so far as the other property was concerned, and the mere fact that honest error may at times be made in assessment by an assessing officer, does not deprive the court of equity of the power when it once has assumed jurisdiction to grant relief to which a property owner is entitled, under the facts shown in the record. The court found, it must have found, that as to the dams not only were they excessively assessed, not only were they unjustly assessed, but that it was not a mere error of judgment, and that no intelligent effort was made to ascertain their value. It would be just as easy for the assessor to understand and find the value of the machinery, to ascertain the value of the entire plant, as it would be for him or his engineers to determine the value of those dams.

To increase the valuation for assessment purposes of property such as the property of the Appellant $200,000 or $300,000 or $400,000 must of necessity involve the practical taking of that property, and if there is no relief in equity, not only are the provisions of the Idaho Constitution disregarded, but the property of the taxpayer is taken from him without redress, without right and certainly in violation of the principles both of justice and equal taxation and of equity. We assert, therefore, that accepting the finding of the court below as to the value for the purposes of this case, accepting the meager depreciation and maintenance allowed and the very small sum allowed for management, we have been

deprived of the benefit of the court's finding, and that if it had the power to enquire, it had the power to give to the appellant the benefit of its conclusion.

It was earnestly urged on behalf of the respondents, to which the court below seemed to give some heed, that a large valuation might be justified against the property of the appellant because of the peculiar location thereof, and because it permitted the appellant to store the waters in Lake Coeur d'Alene which increased the low water flow of the Spokane river, and thereby afforded not alone advantage to the power plant at Post Falls, but incidentally advantage to other power plants owned by the appellant in the State of Washington. The court, we believe in this respect erred, and for these reasons:

Section 1646 of the Revised Codes of Idaho defines the term "value" and "full cash value" as follows:

The term "value" and "full cash value" means the amount at which the property would be taken in payment of a just debt due from a solvent debtor.

And it is at the full cash value that property must be assessed. We, therefore, assert that the mere fact that the appellant owns power sites in Washington which are incidentally benefited by this power development, does not add to the value of the power site or plant at Post Falls for assessment purposes because that property for assessment purposes must be valued at that

amount at which it would be taken in payment of a just debt due from a solvent debtor, and without regard to other plants which it may have in another state. The power plants owned by the appellant in the State of Washington are benefited proportionately no more than are the power plants of other individuals and corporations situated upon the same river. Whatever advantage the one gets the other gets from having an increased low water flow in the river. It is purely incidental to the conservation of the water in the lake for the Post Falls plant.

The evidence of Mr. C. S. McCalla (Record pages 597 to 612, 614 to 618) explains the effect of the control of the water at Post Falls upon the other water power plants of the company in the State of Washington. As Mr. McCalla explains, the water used at Post Falls does not relatively or anything like relatively benefit other power plants in the State of Washington, for the reason that the water reaches those plants at the wrong time of day, and used as it is at Post Falls it reaches the points of use in Washington at times when the water is not needed on account of the character of the service; and his testimony is that with the lack of storage at the plants in Washington the additional water is of little additional advantage, although of some. More than that it is a matter of public knowledge that the value of the plants of the company in the State of Washington are based for assessment purposes upon

what they will produce in the way of electric energy; and in arriving at that value any added electrical energy there generated by reason of the additional flow in the river is taken into consideration the same as the values of properties owned by others than the appellant. We assert that this plant in Idaho, which is used so far as the Idaho demand is concerned, should be valued and assessed the same as if it were owned by some person other than the Washington company. That is the valuation for assessment purposes prescribed by the statutes of Idaho. The property, as a matter of fact, is given an additional value which is taken into consideration by the court below, by reason of appellant's ownership thereof, and that is, that all electrical energy which can be there generated can be sold to advantage, for such as is not used in the State of Idaho is taken to the State of Washington and there distributed and sold by the Washington Water Power Company, and in determining the value of the property based upon its earnings, the Washington Water Power Company charges itself with that electricity at the same price that it is selling to others at the switch board. We, therefore, earnestly urge that the value at which that property can be assessed is the value of the property separate and apart from any other property of the Washington Water Power Company, what it would bring; in other words, what it would be worth to an Idaho corporation which took it in payment of a just debt due from a solvent debtor.

It is true the flow of the river is somewhat increased by the storage in Lake Coeur d'Alene, but the advantage, as explained by Mr. MacCalla, to the other plants is more theoretical than real. As Mr. MacCalla testified, the water is used at Post Falls at the peak load which occurs at five or six o'clock in the afternoon. That increased flow reaches Spokane at two or three o'clock in the morning, at the time when the demand is least; it reaches the Little Falls plant on the following forenoon when the demand is also small. Without storage at these plants below, the increased flow and benefit is in the greatest measure lost, and at those plants is largely wasted because it cannot be held for use without local storage. According to the testimony of Mr. MacCalla (Record, pages 610-611), the water has been used at Post Falls to as great advantage as it could be. The value of the Post Falls plant depends upon the use of that water there without consideration to the other plants on the river, and the earnings of the plant are based upon the fullest use of the water which careful operation could make.

Suggestion was made in the course of the trial that the value of the property might in some way be enhanced by the ability to so control the water as to injure or benefit plants situated on the river in the State of Washington. Such a use, however, would be at the expense of the development at Post Falls, and the greatest use of the water there. So long as the water is used as it has been at Post Falls

for developing electric energy in the most efficient manner and to the full capacity, then such matter has no consideration here. Moreover, the owner of that plant is a public service corporation in Idaho and has acquired much of its property under the right of eminent domain. It is subject to the control and regulation of the state: the electricity which it produces is subject to use at reasonable rates by the people of the state. To use it for any such purpose as to benefit or injure other water powers and without consideration to its use at Post Falls would be a violation of its public duty, a violation of the law of eminent domain both in letter and in spirit, and would undoubtedly subject the person or corporation owning the property to the pains and penalties of the law, even to the loss of the over flow rights acquired under the eminent domain statutes of the state. The mere fact that it has a property there, which by the use of the controlling works could let the water down for greater beneficial use at Spokane or elsewhere, cannot affect its value when consideration is given to the fact that it has an electrical power generation station at Post Falls, that the water has been used, is used and is proposed to be used, and under the law must be used for the development to its reasonable capacity of the power at Post Falls to supply the demands of the people of the State of Idaho.

There is no suggestion in the record that the appellant has not efficiently operated its plant and

efficiently used the water. For these reasons, we suggest that both the court below and the officers of the county had no right to take into consideration anything other than the full cash value of the plant, and in fixing that to consider only the amount that that plant would be taken at in payment of a just debt due from a solvent debtor.

The appellant also believes that because of the hazardous character of the business upon which depends the return upon its investment, namely, the use of power in the Coeur d'Alene Mining District (Testimony of Mr. Huntington, Record pages 395-6; testimony of Frederick Burbidge, page 370), that the reasonable rates of return shall be 10 per cent. However, the court below believed that 8 per cent was proper. In view of the fact that there is now a Public Service Commission in the State of Idaho, the appellant does not here urge error on account of the ruling of the court in not finding that the appellant should be entitled to 10 per cent.

PENALTY.

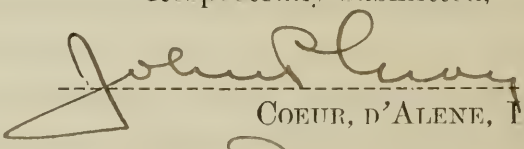
The court included in its decree penalties against the appellant of 10 per cent upon the valuation fixed by the assessor after deducting therefrom the sums by which the same was reduced. In other words, the court held that the appellant was entitled to relief as to the dams and as to the railroad spur and bridge. The assessments were grossly excessive, and under the findings of the court, the court did not find that the property was worth as much as it

was assessed for, yet the appellant was charged with penalties against all property upon which the taxes were not paid, and which were included within the bill of complaint, and this, we assert, was unjust. That the complainant had good cause to complain is shown by the fact that in part, at least, the court has sustained its contention; moreover it has found that it property was assessed at more than it was worth based upon its earnings, its cost or the cost of reproduction.

CONCLUSION.

In conclusion, we earnestly assert that the court below had jurisdiction to grant to the appellant relief; that after an investigation, the court found that the property was not worth more than the sum of $1,718,636.37, and that after taking a view most unfavorable to the appellant, upon the depreciation, maintenance and management allowances. Having so found, we insist that the appellant was entitled to the benefit of that finding and to have the valuation of that property reduced to that sum at least.

Respectfully submitted,



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